Nos. 82-1186 and 82-1465

IN THE

Supreme Court of the United States

October Term, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

FRANKLIN MINT CORPORATION, *et al.*,
Respondents.

FRANKLIN MINT CORPORATION, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

Brief of *Amicus Curiae* Mark Hammerschlag and Ellen Van Fleet in Support of Franklin Mint Corporation

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Question Presented.

Kreindler & Kreindler, on behalf of Mark Hammerschlag and Ellen Van Fleet as *amicus curiae* will address the following question:

Whether the appellate court below properly determined that repeal of the 1973 Par Value Modification Act and the resulting elimination of gold as a unit of account in the United States and international monetary systems rendered unenforceable Article 22 of the Warsaw Convention; the Convention defines the limits of liability of air carriers for wrongful death and personal injury of passengers and cargo loss in the course of international transportation in terms of gold.

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Interest of Mark Hammerschlag and Ellen Van Fleet.

We support the position of Franklin Mint Corporation that the "gold" clause of Article 22 of the Warsaw Convention[1] should be declared unenforceable.

Mark Hammerschlag and Ellen Van Fleet are plaintiffs in actions pending in the United States District Court for the Central District of California wherein each seeks damages for the wrongful death of their respective spouses as a result of the crash of a Korean Air Lines (KAL) Boeing 747 at Kimpo International Airport at the end of a trans-Pacific flight on November 18, 1980.[2] In its Answer to the Hammerschlag and Van Fleet complaints KAL asserted as an affirmative defense that its liability was limited by the Warsaw Convention and the Montreal Agreement.[3] On February 15, 1983, the District Court substantially adopted the reasoning of the United States Court of Appeals for the Second Circuit in *Franklin Mint Corporation v. Trans World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982) and agreed that the elimination of gold in the international and domestic monetary systems had rendered Article 22 of the Convention unenforceable.[4]

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[1]Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 1502 note.

[2]*Mark Hammerschlag, et al. v. Korean Air Lines*, 1981 CV 1058. United States District Court, Central District of California, *sub nom In Re Aircrash at Kimpo International Airport on November 18, 1980*, MDL 482.

[3]Montreal Agreement, C.A.B. Agreement No. 18900, Order F-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), reprinted in A. Lowenfeld, *Aviation Law*, 971 (2d ed. Doc. Supp. 1981).

[4]*In Re Aircrash at Kimpo International Airport, Korea, on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal 1983) *interlocutory appeal denied*, No. 83-8051 (9th Cir. May 10, 1983). *Kimpo* did not follow the Second Circuit's reasoning that Article 22 should be unenforceable prospectively only, finding instead that the provision was unenforceable in the pending cases.

The central questions concerning the enforceability of the gold-based limitation of liability provisions of the Warsaw Convention as presented to this Court by *Franklin Mint* are raised in the narrow context of a cargo loss, not an injury or death claim.

While the United States has long acknowledged that the Article 22 Warsaw Convention damage limit for death or injury is grossly inadequate,[3] the treaty limitation on recovery for lost or damaged cargo has not been a matter of general concern since 1929. All the efforts to amend the treaty left the liability limits for cargo losses essentially unchanged from the dollar value equivalent of "250 francs per kilogram" specified in Article 22(2) based upon a $42.22 per ounce gold price or lower gold value. A 1965 "denunciation" of the treaty, later withdrawn in 1966,[4] and subsequent efforts to permit higher recoveries for Americans are evidence of the depth of United States' dissatisfaction with the low death and injury limits obtained by operation of the Convention.

Many of the signatories to the Warsaw Convention, like the United States, have required international air carriers to provide higher limits of liability for death or injury claims than those

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[3]Department of State Bulletin 923 (1965); see generally, Lowenfeld and Mendelsohn, *The United States and The Warsaw Convention*, 80 Harvard L. Rev. 497 (1967); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), cert. denied 435 U.S. 922 (1977).

[4]The Department of State recalled these events as follows:

"An inter-carrier agreement, known as the 1966 Montreal Agreement, was reached and approved by the C.A.B., and the United States withdrew its denunciation.

The 1966 Montreal Agreement still governs air carrier liability under the Warsaw Convention for flights to and from the United States. Since 1966, there have been intensive efforts to modernize the provisions of the Warsaw Convention and a strong push by the United States for international agreement on limits which would adequately compensate American claimants." Minutes of Hearing Before the Committee on Foreign Relations, United States Senate, 95th Cong., 1st Sess. Executive B, July 26, 1977 at p. 6.

Foreign Air Carrier Permits are issued pursuant to 49 U.S.C. §1302.

obtained under the Convention.' These "special contracts" may be interpreted as admissions that the Convention "gold" clause is outmoded at least insofar as death and injury claims are concerned. They are also evidence of a substantial lack of uniformity in the practical application of the damage limitations in the Convention. No such general reaction has been addressed to cargo losses.

'"(1) Countries which quote a special rate of US $58,000 (equal to 45,000 Special Drawing Rights).

Air Afrique Countries		Ireland	New Zealand
Australia	Israel	Panama	
Belgium	Italy	Singapore	
Burma	Japan	Spain	
Canada	Jordan	Thailand	
El Salvador	Lebanon	United Kingdom	
Finland	Luxembourg		
France	Netherlands		

(2) Countries which quote a special contract rate of 25,500 (equal to 46,400 SDRs).

Bruneri	Gibraltar	Hong Kong

(3) Countries which quote a special contract rate in their own currencies.

Austria	Sch. 1.1m (equal to SDRs 62,400)
Denmark	Kr 375,000 (equal to SDRs 49,000)
Federal Republic of Germany	DM 150,000 (equal to SDRs 60,200)
Norway	Kr 333,000 (equal to SDRs 50,500)
Sweden	Kr. 270,000 (equal to SDRs 48,600)
Switzerland	Fr. 170,000 (equal to SDRs 75,500)

(4) The United Kingdom will be increasing its special contract limit to 100,000 SDRs as of 1 April 1981 and it is believed that France will be increasing its limit 80,000 SDRs from the same date. Other European countries are understood to be thinking of similar increases over the next few months.

All figures have been rounded to a convenient approximation in view of the day to day variations due to currency fluctuations." British Parliamentary Debates (Hansari), House of Commons Official Report, Vol. 997 No. 29 January 20, 1981.

As strong as the case is for holding Article 22 unenforceable when examined in a cargo loss perspective, it is even stronger when examined in the broader context of death and injury claims.

We respectfully submit that a decision by this Court will materially affect the unrepresented class of wrongful death an injury claimants, and accordingly request that we be permitted to address the issues before this Court from their unique and special perspective.[1]

Franklin Mint Corporation and Trans World Airlines have consented in writing to our filing of this brief as *amicus curiae*.

Summary of Argument.

1. The United States Court of Appeals for the Second Circuit properly exercised its constitutional responsibility to interpret treaties when it determined that Article 22 of the 1929 Warsaw Convention was rendered unenforceable by a subsequent Act of Congress and international agreement. The decision implements the principle that where a provision of a treaty is in conflict with an Act of Congress, the one later in time shall be controlling.[2] It

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[1]We respectfully submit that the federal courts which addressed the "gold" issue in the following cases were in error: *See Maschinenfabrik kern, A.G. v. Northwest Airlines, Inc., et al.*, 562 F. Supp. 232 (N.D. Ill. 1983) (selecting last official U.S. price of gold in cargo case); *Deere & Co. v. Deutsche Lufthansa A.G., v. Northwest Airlines, Inc., et al.*, N.D. Ill. No. 81C4726 (Dec. 30, 1982) (selecting last official U.S. price of gold in cargo case); *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) (selecting last official U.S. price of gold in passenger case), *appeal denied on that issue*, No. 82-8018 (2d Cir. Aug. 19, 1982). *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex 1981) (selecting free market price of gold in cargo case), *appeal pending* No./ 81-2519 recognized that the official price of gold was no longer relevant and applicable.

[2]The foreign decisions which, according to TWA (TWA Brief p. 22 fn. 28), determined that the "offical" price of gold was the appropriate Convention conversion factor are clearly distinguishable.

(Continued on following page)

also accords with the *rebus sic stantibus* doctrine which holds that where the facts and circumstances which existed when a treaty was executed and upon which its terms were predicated have substantially changed, the treaty may be declared inoperative.

2. Since 1934 when the United States adhered to the Warsaw Convention our government, through its cabinet departments and civil aviation authorities, has acknowledged that the "gold" clause of Article 22 of the Convention was directly tied to and dependent upon the domestic and international use and acceptance of gold as a monetary unit. A 1974 Civil Aeronautics Board (CAB) Order (74-1-16, 35 Fed. Reg. 1526) and subsequent statements by the Department of State make the relationship explicit. When Congress in 1976 enacted the Bretton Woods Agreement Act and repealed the Par Value Modification Act which had set a $42.22 "official" gold price, it

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(Footnote continued)

Hornlinie A.G. v. Societe' Nationale Petrole, 1972 *Nederlandse Jurisprudentie* No. 269, at 728 (JA 144), *Association Aeronautique v. Thierache,* Tr.b.gr.inst., Paris, France, Feb. 10, 1973, and *Companhia de Seguros Maritimos v. Varig,* Federal Court of Appeals, Brazil, June 3, 1975, all *predate* elimination of gold as the International Monetary Fund unit of account in 1978. A careful reading of *Costell v. Iberia, Lineas Aereas de Espana, S.A.,* No. 255 (Court of Appeals, Valencia, Spain, Oct. 16, 1981, reveals that a pure "official" gold value was *rejected* in favor of an SDR value because of "The abandonment of the classic patterns of monetary systems which are already outmoded." (TWA Brief BA 10). *Pakistan Int'l Airlines v. Compagnie Air Int'l, S.A.,* 79/2278 (Court of Appeals, Aix-en-Provence Oct. 30, 1980) (JA 133) applied the "official" gold value fixed by the governmental declaration as of August 10, 1969, since that was apparently the "official" rate when that particular contract of carriage was made. The court specifically noted that the Second Amendment to the IMF agreements (1978) "prohibiting the fixing of a gold parity as a denomination of the national currency" (JA 138) was not yet in force when the contract of carriage was made. These foreign cases do not fairly support the propositions for which they were brought to the court's attention. Instead they demonstrate an international awareness of the infirmity of Article 22 due to changes in the role of gold in the monetary system.

eliminated any statutory reference to an "official" gold value from our domestic monetary system. The same legislation ratified the elimination of "gold" as a unit of account of the International Monetary Fund and consequently from the international monetary system. After April, 1978, when the repeal became effective, there was no "official" gold value in existence by which to calculate and determine the monetary value of the Convention's damage limits. Continued use of a gold value after April, 1978 to set the limits was unjustified and conflicts with government policy.

3. Though originally designed to protect an infant industry our government has been on record for decades that the limitations of liability for wrongful death and personal injury expressed in the Warsaw Convention are unacceptably, indeed inconscionably, low. The determination by the Court of Appeals below that Article 22 is unenforceable is, therefore, consistent with this position.

4. The markedly changed economic circumstances of today from those which existed in 1929 offer further evidence that there is no justification for giving Article 22 the strained interpretation now proffered by the airlines and the United States. Their restrictive interpretation of Article 22 is neither fair to airline passengers nor required by the treaty. Air crash victims' rights to full recovery should not be compromised by an obsolete treaty provision.

5. The decision of the appellate court below was foreshadowed and anticipated by the aviation community.

6. Courts do not have the power to substitute Special Drawing Rights or any other alternative currency specie for "gold" to calculate damages under the Warsaw Convention.

7. The only available "gold" value for calculating the Convention damage limit is its market value though use of that value is not advocated by the United States or preferred. The best solution is to hold Article 22 unenforceable.

ARGUMENT.

I.

Article 22 of the Warsaw Convention limiting liability of airlines for death or injury in international transportation has been superseded and rendered unenforceable by subsequent congressional legislation, international agreements, and changed circumstances.

A. In Interpreting Article 22 the Court Below Properly Found That the Treaty Provision Had Been Superseded by a Subsequent Act of Congress.

Federal courts have constitutional authority and responsibility to interpret treaties. *Cook v. United States, 288 U.S. 102 (1933); Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934); *Wright v. Henkel*, 190 U.S. 40 (1903); *Factor v. Laubenheimer*, 290 U.S. 276 (1933). In exercising that power courts are obligated to construe treaties according to their ordinary and natural meaning, *Geofroy v. Riggs*, 133 U.S. 258 (1890), and must "ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made." Restatement (2d), Foreign Relations Law of the United States §146. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

More than a century ago, it was determined by this Court that where provisions of a treaty and a subsequent Act of Congress are in conflict, the Act of Congress will control in United States courts as a later expression of our law.

> The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty.

The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227 (1870).

Congressional authority to enact a statute which supersedes or renders ineffectual the provisions of a treaty to which the United States is a party was subsequently confirmed. *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884); *Botiller v. Dominguez*, 130 U.S. 238 (1889).

The vitality of this principle was recently reiterated.

> This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.

Reid v. Covert, 354 U.S. 1 (1955), citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), wherein this Court stated:

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other. . . .

The Warsaw Convention was opened for signature in 1929, and adhered to by the United States in 1934. The underlying purpose for the Convention at that time was to provide uniform

rules and economic protection for the infant international commercial aviation industry,[10] and to limit the liability of air carrier for death or injury to passengers and cargo loss.[11] The treaty created a presumption of liability which could be overcome only by a showing that the loss occurred notwithstanding that the airline had taken "all necessary measures."[12] In addition, airline liability was unlimited if the loss was occasioned by the airline's "willful misconduct."[13]

Article 22 of the Warsaw Convention and Section 6 of the 1976 Bretton Woods Agreement Act, which repealed Section 2 of the Par Value Modification Act, Pub.L. 93-110, §1, 87 Stat. 353 (1973) (formerly 31 U.S.C. §449), are all concerned with "gold" in monetary systems. The 1976 statute abolished the use of gold for domestic and international monetary purposes; the Convention used gold as a basis for measuring the value of damages recoverable and the conversion of that value into national currencies. The attempt to calculate the Article 22

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[10]Uniformity of practice and procedures within the international aviation industry, on such matters as ticketing and bills of lading, etc. can now be accomplished through the International Civil Aviation Organization which was brought into being by the Chicago Convention of 1944, reprinted in *Shawcross and Beaumont on Air Law*, 3rd ed., v.2 no. 7, 1975.

[11]"What is made quite clear is the extent to which the delegates were concerned with creating a uniform law to govern air crashes, with absolutely no reference to any national law (except for the questions of standing to sue for wrongful death, effects of contributory negligence and procedural matters; see Articles 21, 24(2), 28(2). The delegates were concerned lest major air crash cases be brought before courts of nations whose courts were not (according to current Western standards) well organized, nor whose substantive law (according to the same standards) progressive. To avoid the prospect of a jungle-like chaos," *Reed v. Wiser, supra*, 555 F.2d at 1092, the Convention laid down rules that were to be universally applicable." *Benjamin v. British European Airways, 572 F.2d 913, 917 (2d Cir. 1978). See,* Lowenfeld and Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497 (1967).

[12]Warsaw Convention Article 20(1).

[13]Warsaw Convention, Article 25.

damage limit in terms of a gold value, after April 1, 1978, when the legislation became effective, places the 1929 treaty and later statute in direct conflict. It also calculates damages by reference to a "national" law (and a repealed national law at that) which was always anathema to those who drafted the Convention and its adherents.[14]

The fact that the 1976 Bretton Woods Agreements Act does not make express reference to the Warsaw Convention is not a legitimate basis for denying the existence of a conflict. The historical relationship between gold as a monetary unit and the Convention confirms the conflict, and makes it clear that the decision of the court of appeals below had long been foreshadowed and anticipated.[15]

Use of the $42.22 gold value for certain official non-transactional accounting purposes by some international development banks or even by the United States in setting a book value for its gold reserves does not demonstrate the

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[14]See n.11 *supra*; see n.20 *infra*.

[15]"It is clearly established that the airlines knew that 'a rational limit on liability cannot exist' without an internationally agreed upon unit and 'the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated.' Therefore, airlines, including Korean, presumptively knew that this 'international disarray' would prevent the Convention from shielding them in any rational manner, and they would be expected to protect themselves and obtain additional insurance.

Furthermore, the knowledge of this 'international disarray' and the 'recognition by the Warsaw parties that the Convention's unit had been eliminated by events,' contrary to the holding in *Franklin Mint*, would allow the airlines to see—as early as 1975—that, eventually, a court would refuse to enforce the Convention. Therefore, this Court's decision as to the enforceability of the Convention is applicable to this action." *In re Aircrash at Kimpo International Airport on November 18, 1980, supra*, 558 F.Supp. at 75.

absence of a conflict between the treaty and the subsequent statute.[16]

There is a complete absence of proof—or even argument in any of the briefs submitted in this case—that the $42.22 gold price has practical transactional significance today which affects people or nations except, of course, the Warsaw Convention.

In light of the foregoing principles the argument by TWA and the United States that the Court below "abrogated" the Convention (TWA Brief p. 15, U.S. Brief p. 13) is unfounded. By applying the principles governing treaty analysis the court below concluded that subsequent legislation and events have rendered the challenged treaty provision unenforceable. The court has merely recognized and reacted to legislative and other historical developments.[17] The court did not void the Warsaw Convention; it merely held one provision inoperative.

Authority to conduct the foreign relations of the United States is committed by the Constitution to the Executive and the legislative branches of government. There was no invasion of this role by the appellate court. The Bretton Woods Agreement Act was enacted in 1976 in furtherance of our nation's foreign

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[16]"We note the reference to "articles of agreement" of certain international development banks at TWA Brief p. 17 n.24 and 18 n.24. Each of the development banks mentioned was chartered by international agreement or treaty between 1945 and 1965. Consequently, the reference to subscriptions in terms of "gold" is fully understandable when those "banks" were founded. TWA candidly acknowledges that the change to SDRs for valuation of the Work Bank's capital stock was an "internal" matter. (TWA Brief p. 17 n.24). The fact that after 1978 the World Bank "will continue to accept capital subscriptions . . . at the last par value of the U.S. dollar" is totally irrelevant to the issue before this Court. None of its articles of agreement limit the rights of individuals. They relate to accounting procedures peculiar to that institution.

[17]"The inter-relationship between the Executive, Legislative and Judicial branches of our government is demonstrated in *Goldwater v. Carter*, 481 F.Supp. 949, reversed 617 F.2d 697, vacated 444 U.S. 996 (1980).

policy as was the Warsaw Convention in 1929. The foreign policy decision to remove "gold" from its role in monetary systems conflicts with the earlier foreign policy decision to rely upon a "gold" value to limit airlines' liability. Whatever "political questions" were raised by the "gold" issue were resolved by Congress and the Executive not by the courts. Thereafter, a court which recognizes, accepts, and acts in a manner consistent with these foreign policy judgments is properly exercising its judicial function. *See, Van Der Weyde v. Ocean Transport Co.*, 297 U.S. 114 (1936).

Furthermore insofar, as the "foreign policy" argument of the United States is concerned (U.S. Brief p. 2), the comments of Justice Powell in *Dames & Moore v. Regan*, 453 U.S. 654, (1981) citing *Armstrong v. United States*, 364 U.S. 40 (1960) are in point.

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justness, should be borne by the public as a whole.

453 U.S. 654 at p. 691. No showing has been made in the court below or in this Court to justify using victims of air crashes to further the foreign policy interests of the nation.

The argument in the United States' brief herein supporting the use of the $42.22 repealed "official" gold value is a change from public positions our government has taken (*infra* pp. 15-23). The alteration in its public stance may be the reaction of some who mistakenly misperceived or disregarded the dramatic changes which affected international monetary affairs and the Convention which portend the end of antiquated and unnecessary airline industry protectionism.

B. Holding Article 22 to be No Longer Enforceable Properly Applies the *Rebus Sic Stantibus* Doctrine

The changed role of gold in domestic and international monetary systems coupled with the development of the airline industry since 1929 makes doctrine of *rebus sic stantibus* operative in this case.

> [This is a] name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed. Taylor, Int. L. §394; 1 Oppenheim, Int. L. 550; Grotius, ch. XVI, §XXV; Vattel B. 2, c. 13, §200; Hall, Int. L. §116; Hershey, Int. Pub. L. 319 2 Bouvier's Law Dictionary 2820 (unabridged 3d Rev., 1914) Black's Law Dictionary 1139 (5th Ed. 1979).

One commentator has described the doctrine as follows:

> Although the doctrine of *rebus sic stantibus* is based upon the idea of a relation between the binding force of the treaty and a continuance of a state of facts essentially unchanged, because the parties intended that the continuance of the state of facts should be a condition of the binding force of the treaty, two variations of this concept may be distinguished. In the one case, a tacit clause *rebus sic stantibus* is presumed to be contained in every treaty. In the second case, no such tacit clause is presumed in every treaty; but if, upon examination, it is clear that a particular treaty was entered into with reference to the existence of a particular state of facts, the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, then the rule of *rebus sic stantibus* applies . . .

Hackworth, Digest of International Law, Vol. V, §511 at p. 349; see also, Hill, the doctrine of "*Rebus Sic Stantibus*" in International Law, IX Univ. of Missouri Studies 7 (1934).

The fact that treaties are "contracts" among nations, *Dreyfus v. Von Flinck*, 534 F.2d 24, 29 (2d Cir. 1976), *Cert. denied*, 429 U.S. 825 (1977), which should be interpreted like other contracts, 87 C.J.S., Treaties §13, underscores the point that since the facts and circumstances which led to defining the Article 22 damage limits in terms of "gold" have been materially altered by economic developments, international agreements and domestic legislation the provision should no longer be enforced.[18]

In applying these various principles we believe the court below and the district court in *Kimpo* were mindful of the admonition that treaties must be "liberally" construed to effect their intended purpose.

Factor v. Laubenheimer, supra, at p. 293-294, *Valentine v. United States, ex rel. Neidecker*, 299 U.S. 5, 57 S.Ct. 100 81 L.ed. 5 (1936).

The *rebus sic stantibus* doctrine and the policy favoring liberal treaty interpretation require that in 1983 the judicial focus should favor a treaty construction which does not hurt, but rather helps American airline passengers.

C. The United States Has Acknowledged That the Application of Article 22 Was Linked to and Dependent Upon "Gold" as a Unit of Account in the Domestic and International Monetary Systems

The Warsaw Convention limitation of liability for death or personal injury was stated to be "125,000 francs", and each franc was deemed to refer to a French franc consisting of "65 milligrams of gold at the standard of fineness of nine hundred

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[18] *See, Prepakt Concrete Co. v. Augusto Menendez Const. Corp.*, 293 F.Supp. 638 (D.P.R. 1968) for application of this doctrine in a commercial contract dispute.

thousandths." The treaty limit for cargo was "250 francs per kilogram."[19]

There is no disagreement that the damage limitations were to be calculated in terms of "gold" because the parties to the treaty were determined to have an "international value" rather than one created or determined by national law.[20] Gold was selected because it was then the accepted standard unit of account for international monetary transaction and was an appropriate measure for currency conversion.[21] Use of a gold value was also consistent with the Convention's drafters' intent of utilizing a *uniform* international standard which would respond to inflation.[22]

The Gold Clause Cases, 294 U.S. 240 (1935) demonstrate that prior to the date legislative restrictions were imposed upon the

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[19]"When these two Conventions were drafted, the French franc actually had the gold-value stated in the definition, after its value had been established in 1928 by Poincare. For this reason, it is often referred to as the Poincare gold franc. The drafters of the Convention wisely fixed the gold value of the unit used, whilst leaving to France the satisfaction of the French franc being taken as a basis." Drion, *Limitation of Liabilities in International Air Law*, Martinus Nijhoff, The Hague 1954, p. 182.

[20]A Swiss delegate to the Warsaw Convention said,

"We must base ourselves on an *international* value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, but let's take a gold value." (R. Horner & D. Legrez, Second International Conference on Private Aeronautical Law, Minutes, Warsaw, October 4-12, 1929, at 89-90 (1975).

[21]The $42.22 gold price has *not* been an "international" value since 1978. TWA agrees that use of a gold franc clause in 1929 "is readily understandable when it is considered in light of the international gold exchange system in existence when the Convention was drafted." (TWA Brief p. 6.)

[22]"These increases in the limit of liability show that these limits and the adoption of gold francs as *an imaginary unit of account* was agreed upon not only in order to achieve uniformity among all the contracting parties, but also in order to provide adequate compensation and"—in the words of Asser—"to protect their real value." Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. Mar. L. & Com. 73, 76 (1976).

use of gold clauses in private agreements by the Gold Reserve Act of 1934, 12 U.S.C. §411 *et seq.*, 48 Stat. at L. 337, they were popular in commercial agreements and debt instruments to protect against depreciation and against discharge of an obligation by payment of less than the bargained-for value.[21]

The United States has acknowledged the *direct* relationship between the role of gold as a monetary unit and the Warsaw Convention.

The United States routinely responded to increases in the price of gold by correspondingly raising the limitations of liability for death or injury spelled out in Article 22. When the Gold Reserve Act of 1934 set the U.S. "official" price of gold at $35 per ounce the "125,000 francs" Convention damage limit had a value of $8.291.87. In 1971 the U.S. "official gold price was raised to $38 per ounce, 1972 Pub.L. No. 92-268, 86 Stat. 116 (1972) and the damage limit was recalculated to be $8,666 by the CAB.

A further devaluation of the U.S. dollar was accomplished in 1973 by enactment of the Par Value Modification Act increasing the "official" price of gold to $42.22. The Civil Aeronautics Board again reacted to the 1973 increase in the "official" gold price by issuing its CAB Order 74-1-16. The CAB explicitly ruled that the change in the price of gold *in the monetary system* had the effect of requiring that the Convention damage limit for death and injury be raised to $10,000. This 1974 Order on its face *confirms* the long-standing *direct relationship* between the statutes regulating the gold value and the Convention:

> The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no

[21] "We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed. When these contracts were made they were not repugnant to any action of the Congress." *Norman v. Baltimore & Ohio Railroad Company*, 294 U.S. at p. 302.

> change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from $35 per ounce to approximately $38 which took place effective May 8, 1972, and such revisions have been made. On September 21, 1973, Public Law 93-110 was enacted further devaluating the U.S. dollar to approximately $42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.

CAB Order 74-1-16, Docket No. 26274, 39 Fed. Reg. 1526 (JA 55).[24]

The Jamaica Accords[25] gave the elimination of gold as a monetary unit its formal international dimension.[26]

The reaction of the Department of State (DOS) to the elimination of gold in the international and domestic monetary system[27] and its effect on the Warsaw Convention was predictable and publicly stated. DOS advised the Senate Committee on Foreign Relations in 1977 as follows:

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[24]The statement in the TWA brief at p. 19. "The Par Value Modification Act has always been totally unrelated to the effectiveness of the Warsaw Convention and, therefore, its repeal is necessarily irrelevant to the treaty's continued viability" is plainly wrong.

[25]Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 effective April 1, 1978.

[26]*See*, 1976 U.S. Code Cong. and Admin. News, Vol. 5, p. 5938 for the legislative history of the Bretton Woods Agreements Act.

[27]See, Vol. 1, *Report to the Congress of the Commmission on the Role of Gold in the Domestic and International Monetary Systems*, March, 1982.

> *A further development affecting the Warsaw Convention occurred in the early 1970's. The role of gold in the international monetary system was diminished,* and the period experienced the development of a new monetary unit for financial transactions, the Special Drawing Right, or SDR, of the International Monetary Fund. The limits of liability in the Guatemala City Protocol, as well as in the other Warsaw instruments, are expressed in gold. The United States, seeking to take advantage of the schedule of the 1975 Montreal Conference, pressed for expansion of its agenda to include consideration of an SDR provision to replace the gold clause in the Guatemala City Protocol. (Emphasis supplied.)[21]

The Senate Committee on Foreign Relations confirmed these observations, but went further. The committee recognized that the role of gold "would end", and that a new method of currency conversion would have to be found.

> In the period preceding the 1975 Montreal Diplomatic Conference, it also became apparent that the role of gold as the basis for world currency conversion would end. Since Article 22 of the Convention (as amended both by The Hague and Guatemala City Protocols) provides for conversion of the liability limits to national currencies on the basis of the "poincare franc"—a measure of gold equivalency—it became apparent that a new method for currency conversion would have to be found.

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[21]Minutes of Hearing Before the Committee on Foreign Relations, United States Senate, 95th Cong. 1st Sess., Executive B, July 26, 1977, p. 7; *The Guatemala City Protocol,* done March 8, 1971, reported in A. Lowenfeld, Aviation Law 975 (2d ed. Doc. Supp. 1981 was a protocol to increase the Warsaw Convention damage limit to the dollar equivalent of $100,000; *see, Reed v. Wiser,* 555 F.2d at p. 1084.

Executive Rept. 97-45. Report of the Committee on Foreign Relations, United States Senate, Montreal Aviation Protocols Nos. 3 and 4, December 16, 1981 p. 3-4.[29]

The Civil Aeronautics Board has *not* taken the position that the gold clause of Article 22 remains enforceable. Three CAB staff memoranda, however, have been written on the subject, but none of them constitutes an order or decision of the Board.[30] Nevertheless, they do demonstrate the awareness of the United States' civil aviation authorities of the relationship between statutory changes and IMF adjustments in the value and role of gold to the Convention.

The March 18, 1980 memorandum authored by the CAB Chief, Policy Development Division (the Kennedy Memorandum) in fact stated:

> During the early 1970's, the carriers and many governmental aviation authorities foresaw the effects that the changing role of gold could have on the interpretation of provisions like Article 22.[31]

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[29]The antipathy of Congress to "gold clauses" is further evidenced by 31 U.S.C. §5118 which updated the government's refusal to permit their enforcement. Pub.L. 97-258, 96 Stat. 985, Sept. 13, 1982.

[30]P. Kennedy, Memorandum, Policy Develoment Division, Bureau of Consumer Protection, Civil Aeronautics Board (Mar. 18, 1980) (JA 42); J. Gaynes, Memorandum, Legal Division, Bureau of International Aviation, Civil Aeronautics Board (Apr. 18, 1980) (JA 60); J. Golden "Warsaw Convention Liability Limits," Memorandum, Director, Bureau of Compliance and Consumer Protection, Civil Aeronautics Board (May 20, 1981) (JA 33).

[31]Highlighting the relationship between IMF action and Article 22 of the memorandum continued: "Under the original Articles of Agreement of the IMF, each member country was obliged to establish a par value for its currency, expressed in terms of gold or the U.S. dollar (the value of which was expressed in terms of gold) for the official settlement of international currency transactions. Pursuant to this requirement, the United States established a par value of the dollar as $35 per fine troy ounce of gold. In 1972 and again in 1974,

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The May 20, 1981 staff memorandum (The Golden Memorandum) concluded that the CAB should continue to observe the "legal fiction" inherent in the $42.22 gold value, while noting "In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions." (JA 39.)

Commenting on the May 20, 1981 CAB Memorandum, the Court of Appeals below observed:

> The CAB order on which Judge Knapp relied was expressly permised on the existence of an official price under the Par Value Modification Act of 1973. The more recent internal CAB memorandum supporting continuation of that order is based ultimately on a policy determination that the last official price is the best available standard. The inconsistency of the CAB position, however, is starkly evident. It rejects SDR's because the Senate has not ratified the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

690 F.2d at 309-310.

In October of 1974, *before* the elimination of gold from the international monetary scene, the Legal Committee of the International Civil Action Organization ("ICAO") Legal Committee issued a resolution to clarify Article 22 at a time when there was a two-tier gold value system—an official price and a market

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(Footnote continued)

Congress passed legislation that changed the par value of the dollar. *In each case, the Board ordered corresponding adjustments to carrier tariffs, raising the liability limits to convert the limits of the Convention, expressed in terms of gold, to U.S. dollars.*" P. Kennedy, Memorandum, Policy Development Division, Bureau of Consumer Protection, Civil Aeronautics Board (Mar. 18, 1980) p. 2.

price—from which to choose.[12] At that time, when an "official" $42.22 gold price was still in limited formal use, the resolution constituted an acknowledgment by ICAO of the pressing "gold" problem which Article 22 presented. The 1974 ICAO Legal Committee interpretation of Article 22 does not support the claim that *after* 1978, use of $42.22 gold value is proper. Even if the ICAO Legal Committee took such a position it would not be binding on this court.

Continued use of the $42.22 value has also been recognized as inconsistent with the intent of the Convention's drafters who used a gold value to maintain the value of currency in times of inflation.[13] The present market value of gold is nearly ten times the 1973 gold price.

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[12]The Legal Committee of ICAO, Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions, 1974. Cited at TWA brief p. 25 n. 32.

[13]"As long as the official price of gold existed and remained fairly constant, the Warsaw limitations remained close to the level considered adquate to cover passenger claims filed with airlines back in the 1930's. The limits for death and personal injury increased with the approval of the Montreal Agreement. But baggage liability limits, which started out at $7.62 per pound in 1934, have not risen appreciably since that time. Following the devaluation of the dollar in 1972, they went up to $8.16 per pound, and in 1974 they increased to the present level of $9.07 per pound. For a hypothetical 44-pound lost suitcase, the maximum amounts the carrier would have to pay a claimant were $330, $359 and $400, respectively. During this period, however, the value of the dollar declined. In terms of purchasing power, three hundred thirty 1934 dollars were worth $1,031 in 1972, $1,215 in 1974 and $1,920 in January, 1980.

The liability limits increase dramatically if the calculations are based upon the market value of gold.

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While the figures for baggage liability limits based on the market value of gold are probably in excess of the value of most passengers' checked belongings, the limits on death and personal injury claims are lower than amounts received by many plaintiffs in wrongful death actions." The Kennedy Memorandum (JA 47-49).

See also, H. Drion, *Limitations of Liabilities in International Air Law*, 1954, p. 183.

Day v. Trans World Airlines, 528 F.2d 31, 35-36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), made the observation that:

> "The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions."

The conduct of our government since 1929 relating international monetary changes and IMF action to Article 22, therefore, is strong support for the position we advocate.

Even the federal courts which have recently accepted the $42.22 "fictive" gold value for Article 22 purposes (albeit we submit, mistakenly) have appreciated the historical relationship between the Warsaw Convention's gold clause and its use within the monetary system, e.g., *In re Air Crash Disaster of Warsaw, Poland on March 14, 1980*, 535 F.Supp. at 842; *Maschinefabrick Kern, A.G., v. Northwest Airlines*, 562 F.Supp. at 237-38. *Boehringer Mannheim Diagnostics v. Pan American Airlines*, 531 F.Supp. at 349-53, while converting the Article 22 damage limit to dollars based upon the free market value of gold, also recognized the direct relationship.

D. Declaring the Article 22 Damage Limits Unenforceable is Consistent With Our Government's Rejection of the Low Limits of Recovery Resulting From the Gold Value Clause

Whatever the rationale which led to United States acceptance in 1934 of the low damage limits for injury and death specified in Article 22 of the convention, it has long been apparent that American victims of air crashes were being grossly undercompensated and that the treaty was an anachronism.

> When the Convention was concluded in 1929, only two years after Lindbergh's historic flight, international air

> travel was in its infancy. We are living in a different world and airlines were no doubt thought to need assistance in developing international air travel. There can be little doubt, however, that the framers of the Convention included the requirements mentioned in view of what my brother Desmond has termed the "drastic restrictions" of the Convention. They were drastic even in 1929. Injury or death from negligence of the carrier was fixed at 125,000 "French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths," art 22, par (4), or $8,29187. Since then our dollar has been devaluated 40% so that the total amount recoverable for injury or death due to negligence is less in 1929 dollar value than $5,000.

Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E. 2d 880 (1949) (Conway, J. dissenting).

The United States has sought to secure higher recoveries for passengers for decades. In 1955, many of the subscribers to the Convention became parties to the Hague Protocol which doubled the Article 22 limits to 250,000 francs or $16,600 for death or injury cases. The United States objected, taking the position that "The central defect in the Warsaw convention is its low limit of liability."[34]

One of the proposals advanced by the United States in 1966 included uniform rules *with no limit of liability.*[35]

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[34]"Hearings Before the Committee in Foreign Relations, 89th Cong., 1st Sess., Exec. H, at 15 (May 26-27, 1965).

[35]"In the summer and fall of 1965, efforts were made by the United States to obtain support for increasing the Warsaw limits to $100,000 per passenger. These efforts were unsuccessful, and the United States announced that it would withdraw from the Convention. Notice of denunciation was deposited in November 1965, to take effect in May 1966. At the same time the United States announced that it would be willing to withdraw the denunication if, before it was to

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When the Guatemala City Protocol reached the Senate floor for a vote on March 8, 1983 in the form of Montreal Potocols #3 and #4, the Senate refused to give its "advice and consent" to ratification. This refusal, according to the Department of State, could trigger "denunication" of the treaty. During the 1977 Hearing before the Senate Foreign Relations Committee, the Department of State spokesman indicated as much during an exchange with the Committee Chairman.

> "The Chairman: Should the United States choose not to ratify protocols 3 and 4, is it the intention of the executive branch to withdraw altogether from the Warsaw Convention?
> Mr. Hansell: I think the answer to that is difficult at this time to forecast, Mr. Chairman. I think we would have to look very seriously at the question of denouncing the convention if these protocols were not approved, but no decision has been taken on that question."

See n.35 at p. 28.

Against this record it cannot fairly be claimed that the consequences of holding Article 22 unenforceable would conflict with any policy of the United States and were not foreseeable.

(Footnote continued)

take effect, there were a reasonable prospect of an international agreement on a limit of liability in the area of $100,000 *or on uniform rules with no limit of liability*, and if, pending the entry into force of such international agreement, a provisional arrangement were concluded among the principal international airlines which would waive the Warsaw limits up to $75,000 per passenger."
S. Executive Rept. B, 95th Cong., 1st Session, Committee on Foreign Relations, Dec. 16, 1981, p. 2.

As the 1977 and 1982 Foreign Relations Committee hearings recount even before the Guatemala Protocols were signed in 1971, the $100,000 limit was recognized to be grossly inadequate. Opponents of the treaty argued that no limit is required for an industry which can readily procure low cost insurance coverage to protect itself from all risk, and 50 senators agreed that the latest expressions of the Warsaw scheme should not be ratified.

E. Preservation of the "Official" Price of Gold for Warsaw Convention Purposes is Anti-Competitive and Contravenes One of the "Goals for International Aviation Policy" Set Forth in 49 U.S.C. §1502(b)

49 U.S.C. §1502(b) provides, in part:

> (b) Goals for international aviation policy.—in formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system.

The policy of promoting competition in international aviation is consistent with domestic goals articulated in the Airline Deregulation Act of 1978, Pub.L. 95-504, Oct. 24, 1978, 92 Stat. 1705.

Allowing airlines to perpetuate the Convention damage limitation at $42.22, the lowest conceivable level under the treaty, would violate the mandate of Congress to promote competition in international aviation.

The CAB is on record that the new government policies favoring competition significantly impact upon the continued justification for the Warsaw Convention scheme.

> Enactment of the Airline Deregulation Act of 1978, Public Law 95-504, October 24, 1978, and the International Air Transportation Competition Act of 1979, Public Law 96-192, February 15, 1980, both of which were aimed at removing governmental intervention from aviation as much as possible, creates a totally different atmosphere than existed in 1977.

Statement of the Civil Aeronautics Board Before the Committee on Foreign Relations submitted September 27, 1981, at p. 3."

II.

The market value of gold is the only gold value which, arguably, may be utilized to calculate the Article 22 damage limitation, but its use is not favored.

We do not believe that use of the market value of gold to establish airline's limits of liability under Article 22 is the best resolution of the conflict, but we are obligated to comment that it is a gold value which would satisfy a literal reading of Article 22(4).

The court of appeals below found the free market value of gold inconsistent with the intent of the contracting parties. 690 F.2d at 310. The United States agreed. (U.S. Brief, p. 25.)

However, in *Zakoupolos v. Olympic Airways*, No. 256/1974 (Feb. 15, 1974), for example, the Court of Appeals (3d Department) in Athens, Greece decided that the fair market price of gold as set on the Athens Bourse was the appropriate valuation for liability limits of the Warsaw Convention.

Likewise, in *Saga v. Sagoland* (Lower Court, Goteberg, Sweden, Oct. 2, 1973) *cited in* Heller, *The Value of the Gold*

"TWA's passing reference (TWA Brief p. 21 n.27) to the Price-Anderson Act, Pub.L. No. 85-256, 71 Stat. 576 (1957) and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 O.S. 59 (1978) is irrelevant to the point of the issue before the Court. Price-Anderson *created* a $560-million fund for recovery, accompanied by an express statutory commitment to " 'take whatever action is deemed necessary and appropriate to protect the public from the consequences of a nuclear accident. . . . to be a fair and reasonable substitute for the uncertain recovery of this magnitude from a utility. . . .' " 438 U.S. at 90-91. The Warsaw limits liability offer no parallel assurances by the government.

Franc—A Different Point of View, 6 J. Mar. L. & Com. 91, 99-100 (1976) and in Larsen, *Legal Problems in Compensation Under the Gold Clauses of Private International Law Agreements*, 63 Geo. L. J. 817, 825 (1975), the Court held that the fair market price of gold was the appropriate valuation for liability limits of the Warsaw Convention. See also, Boehringer, *supra*, p. 6.

The fair market value ensures that claimants are to some extent, within the framework of the Convention damage limits, protected against the vicissitudes of inflation. Therefore, application of the market price rather than the "official" price of gold would further our government's policy that aircraft accident victims' recoveries, although unfairly restricted by treaty, should not be further diminished by inflation.

Special Drawing Rights are clearly not an alternative conversion factor for Warsaw Convention purposes. The court below correctly observed:

> The Convention itself contains not the slightest authority for its use and the Senate has thus far decliend to ratify the Montreal Protocols.

690 F.2d at 310.

We respectfully submit that given the alternative methods by which the Article 22 damage limitations may be calculated, the choice is quite narrow. SDR's and any national currency are unavailable alternatives. The market value of gold is available, but is not a favored alternative. Logic and fairness, therefore, support the best alternative, which is to hold Article 22 unenforceable.

Conclusion.

For the foregoing reasons, we respectfully urge this Court to affirm the judgment below of the United States Court of Appeals for the Second Circuit to the extent that it held that Article 22 of the Warsaw Convention unenforceable and modify the judgment to the extent that it held the treaty enforceable prospectively only.

Respectfully submitted,

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